MOTION FILED

FEB 1 3 2004

(63)

No. 02-1624

In The
Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT

DAVID W. GORDON, Superintendent,
Petitioners,

v.

MICHAEL A. NEWDOW,
Respondent.

On Writ of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF ASSOCIATED PANTHEIST GROUPS IN SUPPORT OF RESPONDENT

Michael C. Worsham, Esq.
Counsel of Record
1916 Cosner Road
Forest Hill, Maryland 21050
michael@worshamlaw.com
www.worshamlaw.com
410-557-6192 (Phone)
410-510-1870 (Fax)

Dov M. Szego, Esq. On brief
Robert Walker & Associates
217 West Broad Street
Richmond, Virginia 23220
dov@robertwalkerlaw.com
(804) 780-2889 (Phone)
(804) 780-3146 (Fax)

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv
CASES iv
RULES CITED vi
SECONDARY SOURCES CITED vi
STATUTES AND CONSTITUTIONAL AMENDMENTS CITED vi
MOTION FOR LEAVE TO FILE AS *AMICUS CURIAE* 1
BRIEF *AMICUS CURIAE* OF *AMICUS* IN SUPPORT OF RESPONDENT 3
I. INTERESTS OF *AMICUS* 3
II. QUESTIONS PRESENTED 4
III. FACTS 5
IV. PROCEDURAL HISTORY 5
V. SUMMARY OF ARGUMENT 5
VI. ARGUMENT 6
1. THE ISSUE OF ESTABLISHMENT OF RELIGION IS ONE OF DISENFRANCHISEMENT OF MINORITY RELIGIONS 6
2. THE EXPRESSION OF RELIGIOUS SENTIMENT IN THE PLEDGE OF ALLEGIANCE IS PARTICULARLY AT

ODDS WITH THE PANTHEIST RELIGION 12
3. THE INCLUSION OF THE WORDS "UNDER GOD" IN THE PLEDGE OF ALLEGIANCE BY THE FEDERAL GOVERNMENT IS AN UNCONSTITUTIONAL ESTABLISHMENT OF RELIGION 13
4. THE SCHOOL BOARD'S REQUIREMENT OF THE RECITATION OF THE PLEDGE OF ALLEGIANCE WITH THE LANGUAGE "UNDER GOD" INCLUDED IS AN UNCONSTITUTIONAL ESTABLISHMENT OF RELIGION 13
1. Each of the Government Practices Described Above Fails the *Lemon* Test for Unconstitutional Establishment of Religion 14
A. Character and purposes 14
B. Nature of the aid and Relationship with the Government 16
2. Each of the Government Practices Described Above Fails the Endorsement Test for Unconstitutional Establishment of Religion 16
3. Each of the Government Practices Described Above Fails the Neutrality Test for Unconstitutional Establishment of Religion 17
5. THE SCHOOL BOARD'S REQUIREMENT

OF THE RECITATION OF THE PLEDGE OF ALLEGIANCE WITH THE LANGUAGE "UNDER GOD" INCLUDED IS UNCONSTITUTIONAL COMPELLED SPEECH 19
6. THE SCHOOL BOARD'S REQUIREMENT OF THE RECITATION OF THE PLEDGE OF ALLEGIANCE WITH THE LANGUAGE "UNDER GOD" INCLUDED ALSO INTRUDES ON FAMILY RIGHTS 19
VII. CONCLUSION 21

TABLE OF AUTHORITIES

CASES CITED

Agostini v. Felton,
521 U.S. 203 (1997). 10, 11

Aguilar v. Felton,
473 U.S. 402 (1985). 10

Allegheny County v. Greater Pittsburgh ACLU,
492 U.S. 573 (1989). 8, 11

Board of Ed. of Kiryas Joel Village School Dist. v. Grumet,
512 U.S. 687 (1994). 18

Capitol Square Review Board and Advisory Bd. v. Pinette,
515 U.S. 753 (1995). 17

Employment Division of Oregon Dept. of Human Resources v. Smith, 494 U.S. 872 (1990). 18

Good News Club v. Milford Central School,
533 U.S. 98 (2001) 11

Lamb's Chapel v. Center Moriches Union Free School Dist.,
508 U.S. 384 (1993). 8, 11

Lee v. Weisman,
505 U.S. 577 (1992). 9

Lemon v. Kurtzman,
403 U.S. 602 (1971). 7, 8, 10, 11, 14, 16

Lynch v. Donnelly,
465 U.S. 668 (1984). 7, 8, 11, 16

Meyer v. Nebraska,
262 U.S. 390 (1923). 20

Newdow v. U. S. Congress,
328 F.3d 466; 176 Ed. Law Rep. 44, (2003). 11, 19

Pierce v. Society of Sisters,
268 U.S. 510 (1925). 21

Rosenberger v. Rector and Visitors of Univ. of Va.,
515 U.S. 819 (1995). 9, 10

Santa Fe Independent School Dist. v. Doe,
530 U.S. 290 (2000). 15, 18

Skinner v. Oklahoma,
316 U.S. 535 (1942). 20

Stanley v. Illinois,
405 U.S. 645 (1972). 20

West Virginia Bd. of Ed. v. Barnette,
319 U.S. 624 (1943). 15, 19, 20

Wisconsin v. Yoder,
406 U.S. 205 (1972). 20

Zorach v. Clauson,
343 U.S. 306 (1952). 6, 7, 16, 17, 21

RULES CITED

Rules of the Supreme Court Rule 37 ..... 2, 5

SECONDARY SOURCES CITED

B. A. Robinson, *How Many Wiccans are there in the U.S.?* (Last modified May 20, 2003) http://www.religioustolerance.org/wic_nbr.htm. 12, 20

Webster's 9th New Collegiate Dictionary (1989). 13

STATUTES AND CONSTITUTIONAL AMENDMENTS CITED

United States Constitution, Amendment I. 2, 4-6, 19

United States Constitution, Amendment XIV. 20

MOTION FOR LEAVE TO FILE AS *AMICUS CURIAE*

1. Associated Pantheist groups ("Pantheists" or "*Amicus*") respectfully move this Court for leave to file the attached brief *Amicus* curiae.

2. *Amicus* is a collection of organizations representing followers of the Pantheist religion, including:

   a. The Universal Pantheist Society (UPS), formed in 1975. UPS publishes a quarterly journal advancing the ideas of modern Pantheism, a website, and offers discussion groups for its members, who are located in approximately 27 states.

   b. Pantheist Association for Nature (PAN), founded in 1998. PAN's members celebrate the wonder, beauty, and divinity of Nature and see Pantheism as a wellspring of ecological consciousness. PAN's members believe that when people view Nature as sacred, they may more readily treasure the natural world which sustains all life.

   c. World Pantheist Movement (WPM), incorporated in 1998. WPM has members in all U.S. states and operates with the central goal of promoting reverence for nature and the Universe.

Pantheism as a religion and practice has been around since the time of ancient Greece and earlier. *Amicus* takes a particular

interest in the separation of church and state but has never filed a brief with this Court. Pursuant to Rules of the Supreme Court Rule 37(6), *Amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than the groups collectively comprising *Amicus* has contributed monetarily to the preparation or submission of this brief. This brief was prepared *pro bono publico* by counsel, and was funded by those groups comprising *Amicus*.

3. This case requires a re-examination and explication of the doctrine of separation of Church and State and the boundaries of the Establishment Clause of the First Amendment to the United States Constitution. *Amicus* believes that this case will require that certain of this Court's cases in those areas be overruled, limited, or distinguished, and that the result is likely to considerably change the landscape of Separation of Church and State and Establishment Clause jurisprudence.

4. *Amicus* seeks to make the Court aware of its unique position on the issues of the Separation of Church and State as a minority religion and practice for the purpose of providing the Court with additional perspective on those issues. The position of Amicus, while aligned generally with that of the Respondent, is not adequately represented in these proceedings by parties or *amici* already joined herein

5. Pursuant to this Court's rules, the undersigned sought leave to file the attached brief. The United States and Petitioners have not yet responded; Respondent has consented.

BRIEF *AMICUS CURIAE* OF *AMICUS* IN SUPPORT OF RESPONDENT

I. INTERESTS OF *AMICUS*

As noted above, *Amicus* is a conglomeration of several organizations representing, involved in and/or constituting the Pantheist faith. Pantheism itself is an ancient religion, with roots in classical Greece, ancient India, and some aboriginal cultures, and has continued as a religion and belief system through to the present day. At this time, formal following for Pantheism is increasing, and it is the opinion and position of *Amicus* that many agnostics and others who do not call themselves "Pantheists" generally align themselves with at least portions of the Pantheist faith.

Just as the beliefs of Catholics and Baptists differ in subtle ways, so do the beliefs of Pantheists. According to the Universal Pantheist Society, Pantheism is the belief that the Universe is divine and the Earth is sacred. For them, religion is seen as a system of reverent behavior toward Nature rather than anthropomorphic deities. According to the World Pantheist Movement, which avoids theistic vocabulary in its official statements though allowing freedom of vocabulary to its members, Pantheism is a profound religious reverence for Nature and the Universe. It involves deep respect and care for the environment, for science and for human rights, and excludes belief in a supernatural deity or deities. According to the Pantheist Association for Nature, Pantheism is a belief that identifies Nature and its creative forces as Ultimate Reality. While some Pantheists adopt the term "God" in reference to the Universe as a whole, Pantheism is not "theistic" in the

sense of believing in a sentient or super-sentient entity. Instead, Pantheism recognizes the Universe as a process, with all individual things forming an inter-related and equally important part of the evolving whole. As a result, Pantheism views humanity in its context as part of the Universe, and preaches unity with all things.

Amicus has considerable interest in the state of First Amendment Law in general, and jurisprudence regarding establishment of religion in particular. As a minority religion, Pantheism is particularly affected by government laws, rules, ordinances and pronouncements such as those at issue in this case. Pantheism does not subscribe to numerous tenets of other religions practiced in America. Several religions include a basic belief in a sentient God, the belief that the Universe was created by God *for* humanity, and therefore that humanity is the most important life form, and the belief that the Universe will come to an end at the whim of this God. Given that the majority has considerable power to create laws and policy reflecting its beliefs, *Amicus* relies heavily on the counter-majoritarian protections of the First Amendment.

II. QUESTIONS PRESENTED

1. Did Congress's addition of "Under God" to the Pledge of Allegiance in 1954 create an unconstitutional establishment of religion?

2. Does requiring the recitation of the Pledge of Allegiance including the words "Under God" in public schools unconstitutionally establish religion?

3. Does requiring the recitation of the Pledge of Allegiance including the words "Under God" in public schools unconstitutionally compel speech or endorsement of ideas?

4. Does requiring the recitation of the Pledge of Allegiance including the words "Under God" in public schools unconstitutionally infringe upon family rights to direct the religious upbringing of their children?

III. FACTS

Omitted as permitted by Rule 37(5) of the Rules of the Supreme Court.

IV. PROCEDURAL HISTORY

Omitted as permitted by Rule 37(5) of the Rules of the Supreme Court.

V. SUMMARY OF ARGUMENT

Amicus presents the considerable diversity of tests used by this Court in weighing whether government actions tending to establish religion are barred by the Establishment Clause of the First Amendment to the United States Constitution. *Amicus* argues that the Congress's addition of the words "Under God" to the Pledge of Allegiance in 1954 violates all of those tests, and further, that the Elk Grove Unified School District's current policy requiring the recitation of the Pledge of Allegiance including that language both violates the Establishment Clause and constitutes compulsion of speech as

prohibited by the First Amendment to the United States Constitution. *Amicus* further argues that the Elk Grove Unified School District's policy of requiring the recitation of the Pledge of Allegiance including "Under God" violates Constitutionally protected interests of the family unit.

Accordingly, this Court should affirm the decision of the 9th Circuit Court of Appeals.

VI. ARGUMENT

1. THE ISSUE OF ESTABLISHMENT OF RELIGION IS ONE OF DISENFRANCHISEMENT OF MINORITY RELIGIONS

The First Amendment's Establishment Clause is counter-majoritarian in wording and intent. If not for the Establishment Clause, a potential or actual majority religion in this Country could simply appeal to members of its following to codify its tenets, thereby, in most cases, outlawing other religions. This much the First Amendment clearly forbids. *Zorach v. Clauson,* 343 U.S. 306, 313 (1952).

This Court has addressed the more difficult question of the boundaries of the First Amendment's prohibition of religious establishment numerous times in the last two decades. Before that time the Court explained:

> ...[there is] no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral

> when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory."

Zorach v. Clauson, 343 U.S. 306, 314 (1952). The Court further noted that the Establishment Clause is intended "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." *Lemon v. Kurtzman,* 403 U.S. 602, 614 (1971).

> The Court enunciated at that time its "Lemon test": In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.

Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).

From this background this Court refined its Establishment jurisprudence. In *Lynch v. Donnelly,* 465 U.S. 668 (1984) the Court addressed a creche erected as part of a holiday display by the City of Pawtucket, Rhode Island. In that case, the Court specifically stated that the *Lemon* test was not the only test to be applied, *Lynch*, 465 U.S. at 679, but still found that the creche passed that test. *Id.* at 685. Calling Establishment jurisprudence a "line drawing process,"the Court found that the creche, viewed in the context of the display (which included reindeer, santa clause, cutout animals, and a sign stating "SEASONS GREETINGS") and the season, had the secular purpose of celebrating the holiday and depicting its origins. *Lynch*, 465 U.S. at 681. Justice

O'Connor wrote separately to stress how important she considered it that the government not appear to endorse any particular religion.[1]

Another creche was at issue in *Allegheny County v. Greater Pittsburgh ACLU,* 492 U.S. 573 (1989), where Justice O'Connor's "endorsement test" proved effectively to be the test used to reach that case's plurality decision. Writing for the Court, Justice Blackmun distinguished a creche standing alone from a menorah beside a Christmas tree, stating that the Creche, alone in a government building, serves to endorse a "patently Christian message" and thus violates the Establishment Clause. *Allegheny County,* 492 U.S. at 601-602. "Endorsement" also proved to decide the issue of the constitutionality of the use of the menorah, with Justice O'Connor concurring on that issue separately with an opinion written by Justice Blackmun. After *Allegheny County* it is unclear whether the *Lemon* test is good law[2].

---

1 "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid." *Lynch,* 465 U.S. at 690 (O'CONNOR, J., concurring).

2 No one could state this more clearly than Justice Scalia in his concurring opinion in *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 398-399 (1993):

> As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of

In *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819 (1995) this Court addressed whether denial of student funds by the University of Virginia to a religiously oriented student organization violated the Establishment Clause. While much of the case turns on speech grounds, the Court addressed Establishment at length, and set forth what appears to be a "neutrality" Establishment test.

> If there is to be assurance that the Establishment Clause retains its force in guarding against those governmental actions it was intended to prohibit, we must in each case inquire first into the purpose and object of the governmental action in question and then into the practical details of the program's operation... A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion... We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies,

---

Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman,* 505 U.S. 577, 586-587 (1992), conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so. [*citations omitted*]

> extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse... More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.

Rosenberger, 515 U.S. at 838-839 (*citations omitted)*. Using that test, this Court found that granting funds to a religious student organization as to any other student organization not only would not violate the Establishment Clause, but the denial of such funding would violate the neutrality toward religion required by that clause. *Rosenberger,* 515 U.S. at 845.

This Court cited the *Lemon* test again in *Agostini v. Felton*, addressing whether public school teachers could be sent to sectarian schools for remedial instruction to disadvantaged children. *Agostini v. Felton*, 521 U.S. 203 (1997). The majority did not then apply that test, focusing instead on only the entanglement "prong" on which the earlier *Aguilar v. Felton* decision was based. *Aguilar v. Felton*, 473 U.S. 402 (1985). *Aguilar* found excessive entanglement with religion, and upheld an injunction enjoining the school district from sending public school teachers to sectarian schools. The Court's decision in *Agostini* overturned the earlier decision in *Aguilar* and found no excessive entanglement of the state in religion, noting that the Court's establishment jurisprudence had "significantly changed" since *Aguilar* had been decided. Four Justices joined in a dissent with Justice Ginsburg, arguing that there had been no such change in Establishment

jurisprudence[3].

In *Good News Club v. Milford Central School,* 533 U.S. 98 (2001) this Court reversed a decision upholding a policy of allowing groups to use the public schools for non-school activities while excluding religious groups. The Court addressed four factors in reaching its decision:

1. neutrality;
2. the absence of coercive pressure;
3. the fact that the case involved private activity, not public; and
4. whether or not there appeared to be endorsement, as per *Allegheny County.*

Good News, 533 U.S. at 114-118. Notably, the *Good News* opinion does not even refer to *Lemon* or its factors, and is particularly silent about "entanglement."

The Court of Appeals in the instant case struggled at length with the question of what test to apply, and even went so far as to discuss an apparent conflict between the circuits. *Newdow v. U. S. Congress*, 328 F.3d 466, 486-488; 176 Ed. Law Rep. 44, 63-67 (2003)[4]. The appellate Court ruled that the *Lynch* and *Allegheny County* cases dealt with public displays, but used, apparently, two different Establishment tests. The later cases dealt primarily with speech and funding, but used an entirely different Establishment test. As the 9th

---

[3] Interestingly, despite his position on the *Lemon* test in his *Lamb's Chapel* concurrence, Justice Scalia joined in the opinion of Justice O'Connor in *Agostini*.

[4] "We are free to apply any or all of the three tests, and to invalidate any measure that fails any one of them." *Newdow* 328 F.3d at 487; 176 Ed. Law Rep. at 64 (2003).

Circuit explained, it is not clear whether this Court intends different Establishment tests in different circumstances. This case offers the Court an opportunity to clarify the requirements of the Establishment Clause, whether by overruling particular tests, joining the several tests, and/or determining which tests apply in which cases.

2. THE EXPRESSION OF RELIGIOUS SENTIMENT IN THE PLEDGE OF ALLEGIANCE IS PARTICULARLY AT ODDS WITH THE PANTHEIST RELIGION

Although theism (belief in a creator God) may not be one particular religion, it nevertheless constitutes only one of several approaches to religion represented in this Country's population. In particular, the phrase "under God" conflicts, at a minimum, with the religious viewpoints of polytheistic religions such as Hinduism or paganism, of non-theistic religions such as Buddhism or pantheism, as well as of the religious positions of atheism and humanism. 27 million Americans claim no religion, at least 1 million are Pantheists Pagans and/or Wiccans, 1.1 million are Buddhist, 991,000 are Agnostics, 902,000 claim Atheism, 766,000 are Hindus, and the Unitarian-Universalism church consists of 620,000 members. Robinson, B. A., *How Many Wiccans are there in the U.S.?*, http://www.religioustolerance.org/wic_nbr.htm. From this one can conclude that at least 30 million Americans, roughly 10% of the United States' population, cannot claim that the country exists "under God" without some contradiction of their religious beliefs, or would feel obliged to opt out of reciting the pledge and risk the social pressures of so doing.

Pantheism is a religion characterized by the absence of a "God," particularly the absence of a sentient deity, or, for

that matter, any deity. Furthermore, Pantheists do not believe that they are subordinate to the Universe, or the Earth, or to other creatures or beings, but instead that all of these things are joined together into a meaningful whole. This makes the recitation that the United States is a Country "under" a deity, meaning that the Country expresses submission or subordination to such a deity[5] directly at odds with the beliefs of Pantheists. If we were to assume it true that the United States asserts itself as a nation "under God," whose existence is not recognized by Pantheists, and that the United States asserts both the existence of and the power of God, then the positions and political standing of Pantheists and other non-believers in the United States are those of outsiders looking in.

3. THE INCLUSION OF THE WORDS "UNDER GOD" IN THE PLEDGE OF ALLEGIANCE BY THE FEDERAL GOVERNMENT IS AN UNCONSTITUTIONAL ESTABLISHMENT OF RELIGION

4. THE SCHOOL BOARD'S REQUIREMENT OF THE RECITATION OF THE PLEDGE OF ALLEGIANCE WITH THE LANGUAGE "UNDER GOD" INCLUDED IS AN UNCONSTITUTIONAL ESTABLISHMENT OF RELIGION

1. Each of the Government Practices

---

[5] "Under"as used in the Pledge of Allegiance is defined as "...subject to the authority, control, guidance, or instruction of..." *Webster's 9th New Collegiate Dictionary*, 1285 (1989).

Described Above Fails the *Lemon* Test for Unconstitutional Establishment of Religion

Applying this Court's *Lemon* test, one would look at the 1954 Congressional addition of the words "Under God" to the Pledge of Allegiance, first adopted in 1942 and the School Board's requirement that children recite the pledge including those words to weigh:

1. The character and purposes of the institutions that are benefitted
2. the nature of the aid that the State provides
3. and the resulting relationship between the government and the religious authority

A. Character and purposes

Amicus does not challenge the Pledge of Allegiance itself, the Congressional authority to endorse such a pledge, or even the value of such a pledge. However, it is the position of *Amicus* that any permissible government purpose for the Pledge of Allegiance, including but not limited to fostering national pride and patriotism, is served just as well without the inclusion of the words "Under God" as with those words. The only purposes served better by the inclusion of "Under God" are impermissible purposes relating to Establishment, whether they be recognition of a particular faith, recognition of monotheism, recognition of *theism* or any other similar purpose.

The same logic applies to the School Board's policy of requiring the recitation of the Pledge of Allegiance. While the underlying policy of the State requires "patriotic exercises,"

the school board chooses the Pledge of Allegiance over other expressions of patriotism which do not include religious affirmations, for example perhaps the singing of the first verse of "My Country 'Tis of Thee," the first verse of "Star Spangled Banner," or the giving of a synopses of an important American historical event.

While the State may have a permissible purpose in requiring patriotic exercises, it cannot select one which includes an inherently religious message and then require it of the student body. Perhaps the only recent decision of this Court to involve such a distinctly religious purpose is *Santa Fe Independent School Dist. v. Doe,* 530 U.S. 290, 304 (2000), in which this Court found a public school policy requiring a prayer before football games to violate the Establishment Clause. In reaching that decision the Court noted "We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions so as to mark those occasions' significance. But such religious activity in public schools, as elsewhere, must comport with the First Amendment." *Santa Fe Independent School Dist,*, 530 U.S. at 307.

This Court had previously noted the importance of strict protection of the Constitution in schools. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943)("That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").

B. **Nature of the aid and Relationship with the Government**

The nature of the "aid" and the relationship between the government and religious authority presented here are inextricably linked. The addition of "Under God" to the Pledge of allegiance serves to elevate the social importance of the principles inherent in the use of those words, namely, Western monotheistic theism.

The requirement that students recite the Pledge including those words, or even that they be forced to sit and listen to their classmates recite the Pledge including those words similarly elevates the apparent status of those same ideals, or alternatively, to imply that other ideals are lesser. Both by the addition of the words to the Pledge and the requirement that the Pledge be stated in public schools each day underscores the comparative importance of "God" over other beliefs, and the use of the machinery of the state to do so puts the weight of the government behind "God." This is precisely what the Establishment Clause forbids. *Zorach*, 343 U.S. at 314.

2. <u>Each of the Government Practices Described Above Fails the Endorsement Test for Unconstitutional Establishment of Religion</u>

The "endorsement test" from *Lynch* brings about the same result. Whether viewed as a separate test or as a re-interpretation of prongs two and three of the *Lemon* test, the

latter-day addition of the words "Under God" to the Pledge of Allegiance represents an impermissible endorsement of religion. This is true whether the addition is seen as endorsing Christianity, or Western Religion, or even theism. The same can be said for the school board's requirement that children recite the pledge at the beginning of school each day. Both amount to the state officially recognizing God, His authority, and the benefit thought to enure to this country from Him. There can be no more evident endorsement of religion. "Where we have tested for endorsement of religion, the subject of the test was either expression *by the government itself*, or else government action alleged to *discriminate in favor* of private religious expression or activity. *Capitol Square Review Board and Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995)(*citations omitted*).

Striking down the inclusion of the objectionable language does not show hostility toward religion either. The Pledge was both legislatively endorsed and religiously neutral for 12 years before the word "God" was deliberately added. In order to heed the warnings of *Zorach v. Clauson*, this Court must give no sect an advantage, and favor none over any other. This Court must recognize the 9th Circuit's decision as correct.

3. <u>Each of the Government Practices Described Above Fails the Neutrality Test for Unconstitutional Establishment of Religion</u>

The addition of "Under God" to the Pledge cannot even arguably be seen to be religiously neutral. The addition of "Under God" favors theism over those religions such as Pantheism and Buddhism, which do not believe in a deity. It

favors theistic religion over non-religion and non-theistic religions. Furthermore, it favors monotheism, particularly Western monotheism, over all other religions.

As above, the same can be said for the School Board's requirement that the Pledge be recited at the beginning of each school day. "Even if the plain language ... were facially neutral, "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Santa Fe Independent School Dist. v. Doe,* 530 U.S. at 317 fn 21 (2000) (*citations omitted*). While the use of "Under God" cannot be seen as neutral, the government cannot ignore the fact that the use of that language has the effect of favoring monotheistic *theism* over other religions, and disapproving of those other religions.

"Neutrality" should *not* be the litmus test for Establishment. This Court has stated that

> there is "ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference...government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause."

Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 705-706 (1994)(*citations omitted*). This, along with the holding in *Employment Division of Oregon Dept. of Human Resources v. Smith,* 494 U.S. 872 (1990) that a neutral law of general applicability can infringe on free exercise of religion, presents minority religions with the chilling prospect

of being caught between the majority's restrictive neutral laws of general applicability and the majority's "benevolent" accommodation of its own religious practices. The interplay of the two doctrines would threaten to swallow the religion clauses of the First Amendment whole.

5. THE SCHOOL BOARD'S REQUIREMENT OF THE RECITATION OF THE PLEDGE OF ALLEGIANCE WITH THE LANGUAGE "UNDER GOD" INCLUDED IS UNCONSTITUTIONAL COMPELLED SPEECH

6. THE SCHOOL BOARD'S REQUIREMENT OF THE RECITATION OF THE PLEDGE OF ALLEGIANCE WITH THE LANGUAGE "UNDER GOD" INCLUDED ALSO INTRUDES ON FAMILY RIGHTS

This Court has earlier addressed the Constitutionality of requiring the Pledge of Allegiance of public school children, and held that people may not be required to recite the pledge. "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Barnette,* 319 U.S. at 637.

In every state in this country attendance at school is mandatory, and the vast majority of American children go to public schools. The Pledge of Allegiance is often, if not always a scheduled activity for young children in public elementary schools, and is actually required by the policy of the California School District in the instant case. *Newdow,* 328 F.3d at 483; 176 Ed. Law Rep. at 195.

The effect of the inclusion of "under God" in this pledge is both to compel these children either effectively to endorse the message, or to be stigmatized by their peers for failure to do so, and to force the children who do not agree with the message to see it endorsed by their state employed teacher, in their state funded school, as required by their state law. This Court has already held that to actually require the Pledge of students violates the First Amendment. *Barnette,* 319 U.S. 624. For families such as those of members of *Amicus*, the inclusion of "under God" has the effect of not only intruding upon the rights of the children as noted above, but also on the rights of the parents and the family. This Court must also recognize that, particularly with respect to children, opting out is not a realistic option. Social pressure of peers and teachers creates compulsion, and the act of opting out draws attention which is always uncomfortable, and at least sometimes physically dangerous. *See, eg. How Many Wiccans, supra.* ("Some heavily oppressed and discriminated against groups, like Wiccans and other Neopagans, often refuse to reveal their religion to a stranger over the telephone because of safety concerns").

This Court has recognized the integrity of the family unit as one protected by both the Due Process Clause of the 14th Amendment, *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), and the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942). Using these sources of protection this Court has safeguarded such rights as parents' rights to "establish a home and bring up children" *Meyer*, 262 U.S. at 399-401, the rights of unmarried fathers to seek custody of their children, *Stanley v. Illinois,* 405 U.S. 645, 658 (1972), the rights of parents to direct the education of their children *Wisconsin v. Yoder,* 406 U.S. 205

(1972), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

"The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce*, 268 U.S. at 535. To require of those families who do not believe in "God" that their children participate in and/or witness a Pledge including an affirmation that this country exists under such a deity at the beginning of each school day unconstitutionally infringes on the rights of the parents and family to direct the religious development of their children.

VII. CONCLUSION

In *Zorach,* 343 U.S. at 313 this Court stated "[Americans] are a religious people whose institutions presuppose a Supreme Being." The recent undercurrent of this Court's decisions and the plain language of this Country's Constitution dictate otherwise. Instead, Americans as a culture are a pluralistic people who derive strength, vitality, and flexibility from their religious, cultural, and ethnic diversity. In fact, *Amicus* notes that even the *Zorach* opinion went on to state, "The government must be neutral when it comes to competition between sects." *Id.* Recognition of these facts and principles requires at a minimum that our government not endorse monotheistic religious beliefs, require schoolchildren to endorse or endure the endorsement of those beliefs each day at school, or compel them to express those beliefs each day at school. For the reasons stated herein, *Amicus* asks that this Court affirm the opinion of 9th Federal Circuit Court of Appeals.

Respectfully submitted,

Michael C. Worsham
Counsel of Record
1916 Cosner Road
Forest Hill, Maryland
21050
(410) 557-6192

Dov M. Szego
Robert Walker & Associates
217 West Broad Street
Richmond, Virginia
23220
(804) 780-2889

February 13, 2004